

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

KARLIN H.,

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH Case No. 2011050623

DECISION

Administrative Law Judge Sophie C. Agopian, Office of Administrative Hearings (OAH), heard this matter on July 26, 2011, in Whittier, California. Attorney at Law Rayda Cabanillas-Alas represented claimant Karlin H., whose conservator, her mother, was also present.¹ Marriage and Family Therapist Arturo De La Torre represented the Eastern Los Angeles Regional Center (Service Agency). Evidence was received and the matter was submitted for decision on July 26, 2011, at the conclusion of the hearing.

ISSUE

Whether Service Agency may discontinue its provision of 98 hours per month of personal assistance for claimant.

¹ The surnames of claimant and her mother are omitted to protect their privacy. Claimant's mother's conservatorship is limited, but includes matters related to the issue in this case, such as claimant's residence, confidential records and papers, medical treatment and education.

FACTUAL FINDINGS

1. Claimant is a 24-year-old Service Agency consumer with profound mental retardation and a seizure disorder.

2. Claimant lives with her mother who is her conservator regarding matters involved in this hearing.

3. It is undisputed that claimant has global developmental delays and medical needs that require her to have 24-hour care and/or supervision.

a. Aside from the seizure disorder, claimant has hypothyroidism, hearing loss, orthopedic abnormalities causing her to have poor balance, urinary incontinence, insomnia and anxiety. She is also legally blind. Despite these conditions, her health is generally stable. (Exhibit 15.)

b. Claimant's most recent psychological evaluation was conducted in March 2007. However, claimant was not able to participate in formal testing due to her lack of capacity to participate. Notwithstanding that, her language skills were determined to be profoundly deficient as she relied upon single words or gestures to communicate basic needs such as "eat" or leading someone by the hand to indicate a desire. Her adaptive skills were also determined to be profoundly deficient as she required adult assistance for all of her "self-help" care, such as feeding, dressing, toileting and personal hygiene. Her social skills were profoundly deficient in that she lacked understanding of appropriate behavior and behaved in an "infantile" fashion, such as yelling and screaming, pulling her mother's hair, throwing and/or mouthing objects, and some self-stimulatory behavior, such as "flicking a pen." (Exhibit 17.)

c. According to a more recent report, dated May 2010, claimant's deficits remain virtually the same as described in 2007. She continues to have profound language delays and uses only single words or gestures to communicate. She is learning to use a communication device to assist with her expression; however, she has little tolerance for it. (Exhibit 16.) She continues to require one-to-one supervision and care at all times to assist her with her toileting schedule, ensure she does not choke on her food, help her maintain her balance and ensure her safety while in the community. (Exhibit F.)

4. Since 2006, claimant has received 98 hours per month of personal assistance services. The service originally comprised of 66 hours of adaptive skills training (AST) and 32 hours of respite; however, the providers were not sufficiently trained to handle claimant's medical and other needs associated with her developmental disabilities, such as her seizures, behaviors, and need for overnight care. Accordingly, claimant and Service Agency agreed that Peoples's Care, a personal assistance agency, would provide 98 hours of personal assistance to claimant in lieu of the AST and respite hours that were originally offered because People's Care had staff members that were qualified to address claimant's needs.

The agreement further included that the personal assistance hours would be available to claimant to use at home or in the community depending on claimant's needs.

5. In July 2009, Service Agency sought to reduce claimant's personal assistance hours to 52 hours per month based, in part, on Service Agency's allegations that claimant's mother was using the hours inappropriately for daycare and/or in-home respite and that claimant was receiving 140 hours each month of in-home support services (IHSS) which duplicated the services provided by personal assistance.

6. Claimant appealed the proposed reduction of services and a hearing was held. On July 2, 2010, OAH's Administrative Law Judge Deborah Myers-Cregar issued a Decision and Order granting claimant's appeal and requiring Service Agency to continue its funding of the 98 hours per month of personal assistance. The Decision and Order was based, in part, on the following factual findings:

[Paragraph 3] The 2008 and 2009 IPPs state Claimant is "medically fragile and needs a great deal of attention to attend to her medical needs." Claimant has monthly and sometimes daily seizures which are not controlled by medication and air conditioned environments. Claimant requires 24 hour care and full support for all aspects of her daily living. Claimant requires 16 medical appointments each year to maintain her health. In December 2006, Service Agency's registered nurse reviewed Claimant's records and determined Claimant required a bedside licensed vocational nurse during respite hours to monitor Claimant's health and epileptic seizures. Claimant has more seizures in the summer heat, and she had three seizures in December 2009 and January 2010 while under the care of her Personal Assistant. Claimant's medical and developmental levels have remained relatively unchanged since 2006.

[Paragraph 4] Mother is Claimant's In Home Support Services (IHSS) caretaker and a single Mother. Mother uses 140 IHSS hours per month for Claimant's domestic care: 60 hours for laundry, 60 hours for groceries, meal preparation and feeding, and 20 hours for cleaning. Claimant is an insomniac, has difficulty sleeping, and paces around the apartment at night. Mother is awake at night supervising her, feeding her, bathing her, and attending to her bed-wetting issues and laundry needs. Claimant is non-verbal but uses a picture exchange communication system (PECS) to communicate. Her food must be cut for her, and she must be prompted to swallow or she will fill her mouth with food. Claimant needs assistance with her hygiene. She must be toileted hourly, as she is not toilet trained and uses diapers. Claimant is ambulatory with an impaired gait and frequently falls. She was diagnosed with cerebral palsy and quadriplegia by her Children's Hospital orthopedic surgeon. Claimant functions at the developmental level of a one year old infant, in the very low range for an adult her age.

[Paragraph 5] Claimant receives 98 hours per month of Personal Assistant support for daily living functions. She does not receive respite or day care. Claimant's April 8, 2008 and March 23, 2009 Individual Program Plan (IPP) living arrangement goal is to continue living in the least restrictive home environment, with the Mother assuming the caretaking duties and Service Agency agreeing to continue funding 98 hours per month of personal assistance. Service Agency wanted 32 Personal Assistant hours to be provided by an in home respite vendor instead, but there was no agreement and no appropriate provider identified or approved.

7. Service Agency complied with the Decision and Order and continued to fund 98 hours per month of personal assistance for claimant until Service Agency determined during a subsequent individual program plan (IPP) meeting that the service was no longer required.

8. In April and May 2011, during claimant's annual review IPP meetings, Service Agency did not offer to continue funding for claimant's personal assistance hours for the upcoming year. According to the IPP document, claimant was receiving other services to meet her needs, including a 30-hour-per-week behavioral day program with a one-to-one aide, AST and counseling services five hours each month, 21 days each year of in-home respite when claimant's mother travels, and 279 hours per month of IHSS.

9. On April 18, 2011, Service Agency notified claimant, by way of a certified letter, that it intended to terminate funding for claimant's personal assistance hours, effective May 12, 2011. According to the notice letter, the reason for the proposed termination was that, as of March 30, 2011, prior to the April/May 2011 IPP meetings, Service Agency had discovered that claimant had been receiving no less than 279 hours of IHSS each month since 2007, which is the maximum number of hours allowed. During the hearing, Service Agency contended that the 98-hours-per-month of personal assistance hours granted to claimant by the July 2010 Decision and Order was based upon claimant's mother's "misrepresentation" to OAH that claimant had been receiving only 140 hours per month of IHSS. Furthermore, according to Service Agency, claimant's receipt of the maximum number of IHSS hours to meet her personal assistance and protective supervision needs obviates her need for additional personal assistance hours funded by Service Agency.

10. Claimant's mother did not appeal the proposed termination within enough time to have the service continue pending a final decision on the appeal pursuant to Welfare and Institutions Code section 4715. The personal assistance service was therefore terminated effective May 12, 2011, as proposed. Claimant's appeal was timely, however, for purposes of having this fair hearing.

11. Claimant's mother testified that she has never misinformed Service Agency regarding the number of IHSS hours that claimant receives. During the hearing, claimant's mother provided a December 2010 statement establishing the number of IHSS hours that claimant has been receiving. According to the statement, claimant was receiving 284.1 hours each month until February 2011, when the maximum number of hours was reduced pursuant

to statute to 273.9 hours per month. The statement indicates how the hours were allocated each week, as follows:

Protective Supervision.....	40.02
Accompany to medical appointments.....	0.46
Care and help with ointment and medication.....	0.23
Bathing, oral hygiene/grooming.....	4.63
Helping in and out of bed.....	0.23
Menstrual care.....	1.09
Dressing.....	3.47
Feeding.....	2.64
Helping to use the restroom.....	4.53
Shopping and other errands.....	0.50
Grocery shopping.....	0.50
Laundry(regularly).....	1.49
Cleaning kitchen.....	1.44
Preparing meals.....	3.47
Domestic services.....	2.97

12. Claimant’s mother has always been her IHSS provider because claimant’s mother prefers to provide the services herself. Thus, she receives hourly compensation for the IHSS services she provides. According to claimant’s mother, the 40.02 hours per week of protective supervision is for caring for claimant at night, eight hours each night, five nights each week, because claimant requires care when she awakes frequently at night and when she wets the bed and needs changing. Thus, in one month, claimant’s nightly care or protective supervision is about 160 hours per month, not including weekend nights. The remaining hours, totaling about 120 hours each month, are for the regular domestic activities identified in Factual Finding 11, such as cleaning, preparing meals, shopping, feeding, dressing and doing laundry. Based on the allocation of hours between those that are for “protective supervision” and those that are for “domestic care,” it does not appear that claimant’s mother substantially misrepresented the number of IHSS hours that claimant was receiving. Paragraph 4 of the Decision and Order states that, “Mother uses 140 IHSS hours per month for Claimant’s domestic care: 60 hours for laundry, 60 hours for groceries, meal preparation and feeding, and 20 hours for cleaning.” It does not refer to the number of hours she uses for “protective supervision.” Accordingly, Service Agency’s contention that the Decision and Order granting claimant a continuation of the personal assistance hours was based upon an erroneous fact is without merit and is not dispositive of the issue in this case.

13. Service Agency’s contention that personal assistance services duplicate IHSS was undermined by witnesses from the agency that provides personal assistance. Claimant attends a behavioral day program operated by People’s Care six hours each weekday with round trip transportation. Following the day program, People’s Care also provides a personal assistant to claimant for up to four hours each weekday to help claimant work on personal care skills. According to the program manager for the personal assistance program, the providers are prohibited from providing services that are “closely related to IHSS.” The philosophy of personal assistance is now “more rigid,” which means the providers are not

allowed “to do services” for clients, but are expected to teach clients the skills needed to perform the services themselves, such as personal and domestic care activities. As an example, the providers should not sweep a dirty floor for a client, but should assist and/or teach the client to sweep the floor. According to the program manager, during the “last two to three months” prior to the hearing, the personal assistance services have been “more in line with this philosophy.” The evidence therefore establishes that claimant’s personal assistance hours are not duplicative of IHSS.

14. Claimant’s personal assistance program supervisor from 2010 also testified regarding the unique services provided by the program. The services she described included self-help skills, adaptive skills training, street safety, verbal communication skills and physical fitness skills. None of these services appear to be duplicative of what is provided by IHSS.

15. The evidence did not establish that claimant’s other services, such as the 30-hour-per-week behavioral day program, the AST and counseling services, which were not clearly defined by Service Agency, or the proposed 21 days of in-home respite are duplicative of the personal assistance service that has been terminated.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)² The purpose of the Lanterman Act is twofold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community (§§ 4501, 4509 and 4685), and to enable them to approximate the pattern of everyday living of non-disabled persons of the same age and to lead more independent and productive lives in the community (§§ 4501 and 4750-4751.) Accordingly, persons with developmental disabilities have certain statutory rights, including the right to treatment and habilitation services and the right to services and supports based upon individual needs and preferences. (§§ 4502, 4512, 4620 and 4646-4648). Consumers also have the right to a “fair hearing” to determine the rights and obligations of the parties in the event of a dispute. (§§ 4700-4716.)

2. The determination of which services and supports are necessary for a consumer is made through the IPP process. The IPP must be developed through a process of individual needs determination, which may include the consumer, the consumer’s parents, a legal guardian or conservator, or authorized representative. The consumer and the family must have the opportunity to actively participate in the development of the plan. (§ 4646, subd. (b).) The IPP must include a statement of the consumer’s goals and objectives based on the consumer’s needs and preferences or, when appropriate, the needs and preferences of

² All section references are to the Welfare and Institutions Code unless otherwise stated.

the consumer's family. (§ 4646, subd. (a).) The development of the IPP must include consideration of a range of service options proposed by the IPP participants, the effectiveness of each option in meeting the goals stated in the IPP, and the cost-effectiveness of each option. (§ 4512, subd. (b).)

3. Section 4648 describes the activities for which regional centers are responsible in order to achieve the stated objectives of a consumer's IPP, including securing needed services and supports. Services and supports may include "personal care" and "daily living skills training." (§ 4512, subd. (b).)

4. If a service agency seeks to change a service previously provided to a consumer, it has the burden to demonstrate its decision is correct, because the party asserting a new claim or proposing changes generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9 [a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting]; Evid. Code, § 500.) Service Agency must prove by a preponderance of the evidence that its decisions are correct because no other law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.)

5. In this case, Service Agency has the burden of proof to establish grounds to terminate claimant's personal assistance services. Service Agency proposed to terminate the service pursuant to section 4659, subdivision (c), which states:

[R]egional centers shall not purchase any services that would otherwise be available from Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, In-Home Support Services, California Children's Services, private insurance, or a health care service plan when a consumer or a family meets the criteria of this coverage but chooses not to pursue that coverage.

If, on July 1, 2009, a regional center is purchasing that service as part of a consumer's individual program plan (IPP), the prohibition shall take effect on October 1, 2009.

6. For the reasons set forth in Factual Findings 3 through 15, Service Agency failed to establish that claimant's personal assistance objectives are being met by IHSS. The evidence established that the services provided by IHSS and those provided by People's Care, her current personal assistance provider, are distinct.

7. Cause exists to grant claimant's appeal and require Service Agency to continue to provide claimant with 98 hours per month of personal assistance.

ORDER

Claimant Karlin H.'s appeal is granted. Service Agency must continue to provide claimant with 98 hours per month of personal assistance services.

DATED: November 21, 2011

SOPHIE C. AGOPIAN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.